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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**

8 **Bobby Ray Sharp,**
9 Plaintiff
10 -vs-
11 **Maricopa County, et al.,**
Defendants

CV-08-2316-PHX-DGC (JRI)

REPORT & RECOMMENDATION
regarding Motion to Set Aside
Entry of Default

12 Under consideration is Defendants Motion to Set Aside Entry of Default, filed
13 October 2, 2009 (#27). Defendants Arpaio and Maricopa County ask the Court to set aside
14 its entry of default against them on October 2, 2009 (#24). Defendants argue that Plaintiff
15 failed to serve them with a copy of his application for entry of default as required by Rule
16 5, and that their responsive pleadings were delayed through excusable neglect resulting from
17 the recent striking of Plaintiff's Second Amended Complaint and the pendency of an order
18 to show cause why the matter should not be dismissed for failure to prosecute.

19 **Magistrate Jurisdiction** - The motion is at least arguably dispositive, and thus
20 outside the jurisdiction of the undersigned magistrate judge, as provided in 28 U.S.C. §
21 636(b). *See e.g. U.S. v. Real Property*, 135 F.3d 1312 (9th Cir. 1998) (assuming that, absent
22 consent to magistrate judge jurisdiction, motion to set aside outside authority of magistrate
23 judge); *Sims v. EGA Products, Inc.*, 475 F.3d 865, 869 (7th Cir. 2007) (arguing setting aside
24 the default outside magistrate jurisdiction because "default concludes the merits, while Rule
25 72(a) covers only 'nondispositive matters'"). Accordingly, the undersigned makes the
26 following report & recommendation.

27 **Failure to Respond** - Plaintiff has not responded to the motion. Pursuant to Local
28 Civil Rule 7.2(I), the undersigned deems Plaintiff's failure to respond to be a consent to the

1 granting of the motion.

2 **Cause to Set Aside Default** - Further, Defendant has shown cause to set aside entry
3 of default. Rule 55(c) provides that a court may set aside a default for “good cause shown.”

4 The “good cause” standard that governs vacating an entry of default
5 under Rule 55(c) is the same standard that governs vacating a default
6 judgment under Rule 60(b)... [and] considers three factors: (1) whether
7 [the defaulted party] engaged in culpable conduct that led to the default;
8 (2) whether [the defaulted party] had a meritorious defense; or (3)
9 whether reopening the default judgment would prejudice [the opposing
10 party].

11 *Franchise Holding II, LLC. v. Huntington Restaurants Group, Inc.*, 375 F.3d 922, 925 -926
12 (C.A.9 (Ariz.),2004) “Where timely relief is sought from a default ... and the movant has a
13 meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the
14 default so that cases may be decided on their merits.” *Mendoza v. Wight Vineyard*
15 *Management*, 783 F.2d 941, 945-946 (9th Cir.1986) (internal quotations and brackets
16 omitted).

17 Culpability - “[C]ulpability’ involves ‘not simply nonappearance following receipt
18 of notice of the action, but rather conduct which hindered judicial proceedings.” *TCI Group*
19 *Life Ins. Plan*, 244 F.3d at 698 (mental state of widow suffering depression relevant
20 consideration). “Neglectful failure to answer as to which the defendant offers a credible,
21 good faith explanation negating any intention to take advantage of the opposing party,
22 interfere with judicial decisionmaking, or otherwise manipulate the legal process is not
23 ‘intentional’ under our default cases, and is therefore not necessarily-although it certainly
24 may be, once the equitable factors are considered-culpable or inexcusable.” *Id.* at 697-698.
25 Here, there is no suggestion of culpability on the part of Defendants. Rather, a credible
26 explanation of the failure to defend has been shown, *i.e.* the striking of Plaintiff’s intervening
27 second amended complaint (*see* Order 7/1/9, #16).

28 Defendants others contentions are less persuasive. Defendants’ argument about
Plaintiff’s failure to serve them is not well taken. Rule 5 provides an explicit exception to
the service requirement in such instances. “No service is required on a party who is in
default for failing to appear.” Fed. R. Civ. P. 5(a)(2). Entry of default is not required for

1 this rule to take effect. “Where defendants, as here, were served with the summons and do
2 not appear and answer within the required period, they are ‘parties in default’ for Rule 5(a)
3 purposes.” *Cutting v. Town of Allentown*, 936 F.2d 18, 21 (1st Cir. 1991).

4 Similarly, the claim of being duped by the Court’s order to show cause does not
5 suggest a reason for failing to respond. To the contrary, it seems it should have alerted
6 Defendants to their precarious state. Moreover, that order did not issue until Defendants
7 were long in default.

8 Meritorious Defenses - Defendant has sufficiently shown a meritorious defense. It
9 is true that a “‘mere general denial without facts to support it’ is not enough to justify
10 vacating a default or default judgment.” *Franchise Holding II, LLC. v. Huntington*
11 *Restaurants Group, Inc.*, 375 F.3d 922, 926 (9th Cir. 2004). However, a party seeking to
12 avoid the effect of a default “need not conclusively establish the validity of the defense(s)
13 asserted.” *Davis v. Musler*, 713 F.2d 907, 916 (2nd Cir. 1983). Here, Defendants assert
14 specific denials of Plaintiff’s factual allegations, have asserted various affirmative defenses
15 (e.g. failure to mitigate, etc.) and have filed a motion to dismiss for failure to state a claim
16 and on the basis that Defendant Arpaio is improperly joined (#26). While the Court is not
17 in a position to decide the case today, there appears no reason to not adhere to the admonition
18 that “a case should, whenever possible, be decided on the merits.” *TCI Group Life Ins. Plan*,
19 244 F.3d at 696.

20 Prejudice to Plaintiff - Plaintiff has not shown any relevant prejudice. “[D]elay alone
21 does not constitute the sort of prejudice cognizable upon a Rule 55(c) motion: ‘it must be
22 shown that delay will result in the loss of evidence, create increased difficulties of discovery,
23 or provide greater opportunity for fraud and collusion.’” *Apache Nitrogen Products, Inc. v.*
24 *Harbor Ins. Co.* 145 F.R.D. 674, 682 (D.Ariz.,1993).

25 For the foregoing reasons, the undersigned finds that Defendants have shown good
26 cause to set aside the default entered against him.

27 **IT IS THEREFORE RECOMMENDED** that Defendants’ Motion to Set Aside
28 Entry of Default, filed October 2, 2009 (#27) be **GRANTED**.

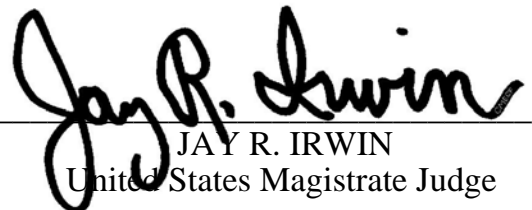
1 **IT IS FURTHER RECOMMENDED** that the default entered against Defendants
2 Arpaio and Maricopa County on October 2, 2009 (#24) be **SET ASIDE**, and that
3 Defendants' Answer (#25) and Motion to Dismiss (#26) be deemed timely filed.

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5 **EFFECT OF RECOMMENDATION**

6 This recommendation is not an order that is immediately appealable to the Ninth
7 Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of*
8 *Appellate Procedure*, should not be filed until entry of the district court's judgment.

9 However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure*, the parties shall
10 have ten (10) days from the date of service of a copy of this recommendation within which
11 to file specific written objections with the Court. Thereafter, the parties have ten (10) days
12 within which to file a response to the objections. Failure to timely file objections to any
13 factual or legal determinations of the Magistrate Judge will be considered a waiver of a
14 party's right to *de novo* consideration of the issues. *See United States v. Reyna-Tapia*, 328
15 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*).

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17 DATED: November 6, 2009

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JAY R. IRWIN
United States Magistrate Judge

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